89-629 (1)

No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1989

UNITED STATES OF AMERICA,

Respondent,

v.

JOSE ANTONIO STORINO,

Petitioner,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Of Counsel:

Peter I.J. Davis
SHAFFER AND DAVIS, CHARTERED

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Question Presented

Has the Court of Appeals for the Fourth Circuit, in denying the appeal requesting a new and separate trial sanctioned the lower courts decision which is in conflict with this courts earlier decisions which mandates a severed trial in a case such as this where substantial prejudice springs from a joint trial.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is, unpublished No. 88-5081 and reprinted at A1.

JURISDICTION

The judgment of the United States Court of Appeals for the 4th Circuit was entered on June 16, 1989 and affirmed the District Court. The Panel denied a timely petition for rehearing and suggestion for rehearing in banc on the severance issue on July 26, 1989.

This court has jurisdiction under 28 U.S.C., Section 1254(1).

STATEMENT OF THE CASE

1. On June 6, 1988 the Hon. John M. Greacen,Clerk, acting for the Court and by its direction, pursuant to Local Rule 28 and Internal Operating Procedure 28.2 entered an Order consolidating the captioned cases for briefing and argument.

2. On March 11, 1988 after a three (3) day joint trial with two other co-defendants in the United States District Court for the

Eastern District of Virginia before the court and jury, Storino was convicted of (1) conspiracy to distribute and possess with intent to distribute cocaine in violation of Title 21, United States Code, Section 846 (Count One); (2) possession with intent to distribute more than 5 kilograms of cocaine in violation of Title 21, United States Code, Section 841 (a)(1) and Title 18, United States Code, Section 2 (Count Three); and (3) interstate travel in aid of racketeering in violation of Title 18, United States Code, Section 1952(a)(3) and Title 18, United States Code, Section 2 (Count Six).

3. On May 13, 1988 the trial court below (Hon. Claude M. Hilton) sentenced Storino to be imprisoned for a term of 120 months on each of Counts One and Three to run concurrently with each other and for a term of 60 months on Count Six to run concurrently with the term of imprisonment

imposed on Counts One and Three. The court also imposed a $50 special assessment against Storino on each of Counts One, Three and Six for a total of $150.00.

4. The conspiracy charged in Count One covered the period beginning October 1987 to December 4, 1987 when agents of the Drug Enforcement Administration ("DEA") arrested the three defendants during an undercover cocaine transaction at the Washington National Airport in the Eastern District of Virginia. The government's trial proof against Storino, however, was limited to his involvement in the interstate transportation of 6 kilograms of cocaine on December 3 and its sale in the drug transaction terminating the conspiracy on December 4, 1987. The government's proof showed no Storino involvement in any of the earlier drug transactions and related activity it offered to prove the conspiracy, thus raising a question as to

whether Storino was involved in a different conspiracy than the conspiracy charged in Count One.

5. Reginald C. Barrett, Jr., ("Barrett") the principal defendant presented an entrapment defense and in addition to his own testimony called to the stand several witnesses including a DEA cooperating individual. Barrett's entrapment defense markedly broadened the scope of relevancy with the result that the court admitted several evidentiary items against Barrett which would not be properly admissible against Storino if he were the sole defendant in a severed trial. Storino had filed his pre-trial motion for relief from prejudicial joinder on January 12, 1988 which the court below later on January 29, 1988 denied as being "moot". Among the items admitted below but which would not be properly admissible against Storino in a severed trial were the following.

a. During the government's cross-examination of the cooperating individual called to the stand by Barrett as part of his entrapment defense the cooperating individual testified to:

(1) a Barrett admission of fronting two kilos of cocaine to a friend in Indiana during October, 1987 (TR. 243) in which Storino was not involved.

(2) his accompanying Barrett to Fort Wayne, Indiana during the early part of the charged conspiracy to retrieve one of the two unsold kilos of cocaine which had been fronted to Barrett's midwestern friend (TR. 243)

(3) a Barrett out of court admission, clearly not in furtherance of the charged conspiracy, and therefore not binding upon Storino, that Barrett was twice before arrested in drug transactions and was then on probation for a previous conviction (TR. 245); and

(4) Barrett's attempt to enlist him in an illegal scheme unrelated to the charged conspiracy to import into the United States 700 kilograms of cocaine from Columbia through Mexico (TR. 241).

b. During Barrett's own cross-examination the government impeached him with:

(1) a 1974 Schuykill, Pennsylvania drug conviction, more than 10 years old, for possession with intent to distribute 16-19 kilograms of marijuana without giving the notice required by Fed. R. Evid. 609 (TR. 363);

(2) a 1981 South Carolina federal conviction for conspiracy to import into the United States 35,000 pounds of marijuana and for aiding and abetting the importation (TR. 363);

(3) the October 9, 1987 drug transaction involving a kilogram of cocaine listed as the first overt act of the conspiracy charged in Count One with which the government's proof did not otherwise connect Storino;

(4) a post-arrest written statement (TR. 388) implicating Barrett in the December 3, 1987 Washington National Airport 6 kilogram cocaine transaction and his earlier interstate transportation of the drugs from New York to Aldie, Virginia and his intention to use the proceeds to import into Virginia from New York another 6 kilograms of cocaine (TR. 391-392);

(5) several other post arrest oral admissions by Barrett to the DEA agents outlining his involvement in the offenses for which he was subsequently indicted (TR. 390-391) in one of which, after being shown Storino's picture, he identified Storino as one of the two individuals involved in transporting from New York the 6 kilograms of cocaine sold to the DEA during the December 4, 1987 Washington National Airport transaction (TR. 391-392).

c. During the government's direct case, contrary to Fed. R. Evid. 403 and 801(d)(2)(3) and over Storino's objection (TR. 165) and motion for a mistrial (TR. 197) the government placed in evidence Barrett's written post-arrest statement (TR. 165) referred to in paragraph 5b(4) above.

REASONS FOR GRANTING THE WRIT

I. A SUBSTANTIAL DEGREE OF PREJUDICE SPRANG FROM THE JOINT TRIAL INUNDATING STORINO AND MANDATING SEVERANCE.

The Appellate's Court's failure to find reversible error in the trial court's

refusal to sever Storino's trial from that of his co-defendants, particularly Barnett was erroneous and decided in conflict with earlier decisions of the courts.

In United States v. Truslow, 530 F.2d 537, 261 (4th Cir. 1975) the court stated that:

> "Although Rule 14 of the Federal Rules of Criminal Procedure places the grant or denial of a motion for severance in the sound discretion of the trial court, if a substantial degree of prejudice springs from a joint trial a severance is mandated." Citing United States v. Shuford, 454 F.2d 792, 776 (4th Cir. 1971) (Emphasis added).

While the joinder for trial of two or more defendants, one of whom pleads entrapment, without more, does not ipso facto create such prejudice as to require a severance, when as here, other factors show a substantial risk of prejudice to another defendant, a severance must be granted. See, United States v. Ellsworth, 481 F.2d

864, 871 (9th Cir.), cert. den., 414 U.S. 1041 (1973).

In United States v. Grant, 549 F.2d 942, 948 (4th Cir. 1977) the court indicated its sensitivity to the requirement that a co-defendant in a joint trial not be prejudiced by evidence from an out of court statement by his co-defendant implicating him which would be excluded in his own separate trial. To avoid the prejudice the court ruled that the prosecutor may be forced to elect between a joint trial in which the statements are excluded, a joint trial in which the statements are redacted* or a severance.

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*Although Barrett's written statement was redacted to avoid the reference to Storino and the third co-defendant Londono (TR. 165) there was no redaction to another Barrett post-arrest statement accompanying his identification of Storino's picture as one of the two individuals who transported the cocaine from New York to Barrett's home in Aldie, Virginia on December 3, which became the subject matter of the December 4, 1987 drug transaction. (TR. 391-392).

The Court's statement that "there has been no showing that the joint trial had an injurious effect on determining the jury's verdict" (Per Curiam Opinion 8) is particularly troubling and indicates that the Appellate Court overlooked material facts in the case.

When unusual circumstances arising at a joint trial manifest the risk of substantial prejudice to a co-defendant a severance is required. See, United States v. Truslow, 530 F.2d at 261. At the trial below the requisite "unusual circumstances" came to the fore when the government, in responding to Barrett's claim of entrapment sought to show his predisposition to commit the offenses with which he was charged by introducing evidence of (1) his five felony drug convictions, one over ten years old, (2) Barrett's illegal scheme to import into the United States 700 kilos of cocaine from Columbia through Mexico and (3) his prior

drug dealings in Fort Wayne, Indiana. None of the aforementioned evidence would have been properly admissible against Petitioner in his own severed trial.

Indeed the substantial risk of prejudice to Storino continued to mount during the trial when, contrary to the mandate contained in Fed. R. Evid. 801(d)(2)(E), the trial court admitted evidence concerning Barrett's several oral admissions and his post arrest written statements implicating Storino with the transportation of six kilos of cocaine from New York to Aldie, Virginia on December 3, 1987. Moreover, not once during the two days of trial did the trial court give the jury any instruction about their duty to consider these evidentiary items only as they pertained to Barrett's guilt or innocence.

Given the limited evidence against Storino, the joint trial resulted in even greater prejudice. Under the circumstances here presented, without even one limiting

instruction during the two days of trial, the continued joinder of defendants became so prejudicial as to Storino as to require exercise of the trial judge's discretion in but one way, i.e. granting a mistrial for prejudicial joinder. Contrary to the court's statement that there was no injury resulting from the joint trial there was clear prejudice which amounted to an abuse of the joint procedure and the trial court's discretion in the matter.

Moreover, the trial court below had a continuing duty throughout the joint trial to protect Storino from the prejudicial joinder and should have sua sponte acted to protect him. United States v. DeDiego, 511 F.2d 818 (D.C. Cir. 1975); United States v. Guterma, 181 F. Supp. 195 (SDNY 1960); United States v. Crawford, 581 F.2d 489 (5th Cir. 1978); and United States v. Sasso, 78 FRD 292 (SDNY 1977).

Given the government's limited evidence linking Storino to the conspiracy charged in Count One and the cumulative effect of all of the evidence admitted, without any limiting instruction to overcome Barrett's entrapment defense, the joint trial procedure resulted in overwhelming prejudice against Storino.

The Court of Appeals should therefore again look at the facts which evidently were overlooked and conclude that substantial prejudice indeed resulted from the improper joinder of the parties at trial, and that the evidentiary spillover from Barrett's entrapment defense inundated Storino depriving him of his substantial rights.

The Appellate Court itself in affirming the lower court cites United States v. Lane, 474 U.S. 438, 449 (1986) in which the Court stated that

> "[a]n error involving misjoinder "affects substantial rights" and requires reversal only if the misjoinder results in actual prejudice because it "had substantial and injurious effect or influence in determining the jury's verdict."

Petitioner contends that properly applied to the facts of his case, United States v. Lane also requires severance of his case from that of his co-defendant's, in particular, that of Barrett.

The trial court's failure to grant Storino's pre-trial motion against prejudicial joinder, the Appellate court's affirmation of the trial courts decision and its denial of rehearing and suggestion for rehearing en banc and its failure to grant Storino a severance when the prejudice from the Barrett related evidence became apparent, suggests that this court should grant certiorari.

CONCLUSION

For the foregoing reasons, this Petition for Certiorari should be granted.

Respectfully submitted,

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A P P E N D I X

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-5081

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

REGINALD C. BARRETT, JR.,

Defendant - Appellant

No. 88-5082

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

JOSE ELIECER LONDONO,

Defendant - Appellant

No. 88-5083

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

JOSE ANTONIO STORINO,

Defendant - Appellant

Argued: April 13, 1989

Decided: June 16, 1989

Before RUSSELL and CHAPMAN, Circuit Judges, and BUTZNER, Senior Circuit Judge.

David Harrison Hopkins; Charles N. Shaffer (SHAFFER & DAVIS, CHARTERED on brief); Sandra Jean Boek for Appellants. Sidney Rocke, Special Assistant United States Attorney (Henry E. Hudson, United States Attorney on brief) for Appellees.

PER CURIAM:

Appellants were each convicted of possession of cocaine with intent to distribute in violation of 18 U.S.C. Section 841(a), interstate travel in aid of racketeering in violation of 18 U.S.C. Section 1952(1) & (3), and other drug related offenses arising out of a plan to bring large quantities of cocaine into the State of Virginia. Appellants were arrested in the parking area of the Washington National Airport at the moment six kilograms of cocaine were being delivered. All of the appellants claim error by the trial court in denying requests for informant information, in limiting the cross examination of the informant, in admitting evidence of appellant Londono's previous deportation from the United States, in failing to suppress appellant Barrett's post-arrest statements, and appellants Storino and Londono claim error in failing to sever

their trials from that of Barrett. Finding no merit in these exceptions, we affirm.

I

Appellant Barrett was renting a farm in Aldie, Virginia in the fall of 1987 when Chafic El Maghariki (Chafic) asked to live there. Barrett claims that although he had been involved in drug trafficking previously, and had prior drug convictions, at the time he met Chafic he was not interested in or involved with drugs. He claims that he was unduly persuaded and entrapped by Chafic, who became a DEA informant, into returning to the drug business. Chafic testified that Barrett was trying to arrange the importation of 700 kilograms of cocaine into the United States from Colombia and that they went to Mexico in an effort to work out the details. Chafic informed the DEA of Barrett's efforts and Agent William

Yout took over the case. Chafic introduced Barrett to Yout, who was posing as a drug dealer interested in purchasing multi-kilos of cocaine. At their initial meeting on October 9, 1987, Yout purchased one kilo of cocaine from Barrett at his farm. This kilo had been previously retrieved from Indiana by Barrett and Chafic. At this meeting and sale, Yout and Barrett discussed additional coke purchases. One week later Yout and Barrett met at LaGuardia Airport in New York to discuss future purchases, and they met again on November 9, 1987 at National Airport for further discussions. In subsequent telephone conversations they agreed upon a price of $20,000 per kilo for 12 kilos of cocaine, but the delivery site and date were not set. Additional telephonic communications follwoed and DEA agents Emile Manara and Judy Young come into the pictures as alleged associates of Yout.

On December 4, 1987, Agent Manara met Barrett at the Marriott in Arlington, Virginia, but Barrett said he did not like to do business in motels and would prefer to make the sale at his farm. He counted $120,000 Manara had brought to the meeting and stated that the kilos had been brought from New York by two persons in the cavity of an automobile. It was agreed that the deal would be consummated at the National Airport, and Barrett stated he would put the cocaine into a parked car at the airport and give Agent Young the keys so that the car could be driven away.

That afternoon Barrett and Manara met at the airport and walked to the parking area. Other DEA agents had the area under surveillance, and they, in addition to Manara, noticed that appellants Londono and Storino were nearby and acting as lookouts. When Barrett opened the trunk of the automobile and showed Manara the six kilos of cocaine,

he was arrested. Londono and Storino were arrested as they attempted to leave the area.

Barrett consented to a search of the farm and Storino's automobile was found there. Testimony established that this vehicle had been modified by lowering the gas tank to make the area or cavity to facilitate the concealment and transportation of drugs.

II

Pursuant to Federal Rule of Criminal Procedure 16 Barrett moved for information about the informant Chafic, seeking a copy of his conviction record, any charges anticipated to be brought at the time he began his cooperation with the DEA agents, any promises or representations made to him including immunity or other leniency, any statements made to induce his cooperation in this case or others, any statements or terms

of employment and whether payment was by cash or by check, the name of each case, case number and the nature and scope of activities of Chafic, copies of all sworn testimony in any other forums, copies of documents or transcripts evidencing unreliability, the circumstances of any polygraph examination and the informant's file maintained by the DEA.

In response to this motion, the United States Attorney stated that since the information sought was primarily for impeachment purposes, it would be produced five days before trial, if he planned to call Chafic as a govenment withness. The trial judge agreed with this course of action. Chafic was not called as a government witness, but Barrett called him as a defense witness in an effort to establish entrapment. Appellants claim error in the failure to provide all of the documents they sought

under Rule 16 and also claim that the trial judge unduly restricted the examination of Chafic.

The court allowed Barrett's attorney to ask Chafic about his employment, the way he was paid and what he did in the present case. The court also allowed testimony as to Chafic's criminal history, his business interests and any promises or agreements between Chafic and the DEA. He was also allowed to testify that he had previously worked for the DEA, but the judge sustained a government objection as to the specifics of other cases. Questions were also allowed which required Chafic to testify as to his income and employment since the Barrett arrest.

Under Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150 (1972), the government must furnish the defendant with material that may be used to substantially impeach a key government

witness. However, these cases are not applicable to the present facts. Chafic was not called as a government witness and he was only a minor participant in the activities that produced the arrest and conviction of the defendants. Once he introduced Barrett to Yout, the initiative was taken by Yout and Chafic played no important role in the subsequent events. The appellants had the benefit of Chafic's testimony, and they were allowed to prove his employment by the DEA for impeachment purposes.

We find no error in the rulings by the trial judge in sustaining objections to testimony that would have gone into the specific details of other cases in which Chafic had been involved.

The failure of the government to produce the information requested under Rule 16 did not prejudice Barrett in his effort to establish entrapment. Since Barrett had

five prior felony drug convictions and the evidence showed various meetings and conversations with the dEA agents, and trips to Mexico, Indiana and New York, it is difficult to see how he expected to establish the affirmative defense of entrapment.

III

Appellants Londono and Storino claim error because the trial court denied their motions to sever their trials from that of Barrett. They claim a prejudicial spillover effect from testimony about Barrett's prior convictions, prior drug dealings, and efforts to import large quantities of cocaine from South America. Under Federal Rule of Criminal Procedure 8(b), defendants may be charged together if they are alleged to have participated in the same act or transaction constituting an offense or offenses. It is not necessary that all defendants be charged in all counts of the

indictment or with all of the underlying acts. Conspiracy cases are particularly appropriate for joinder and joint trial, even though there may be some spill-over of evidence that is admissible against one defendant and not another. The trial judge covered this problem in his final charge and there was no request by defense attorneys for an instruction on this point during the presentation of evidence. In United States v. Lane, 474 U.S. 438, 449 (1986) the court stated:

> [W]e hold that an error involving misjoinder "affects substantial rights" and requires reversal only if the misjoinder results in actual prejudice because it "had substantial and injurious effect or influence in determining the jury's verdict."

There has been no showing that the joint trial had an injurious effect on determining the jury's verdict, and joinder in the present case is in keeping with Bruton v. United States, 391 U.S. 123, 134 (1968), which stated that joint trials "conserve

state funds, diminish inconvenience to witnesses and public authorities, and avoid delays in bringing those accused of crime to trial."

IV

Ther is no merit to Londono's claim that he was prejudiced because the government brought out the fact that he had been previously deported as an illegal alien. He opened the door to this type testimony when he called his sister as a character witness and she testified to the effect that he had never done anything illegal or against the law. She was then asked about his deportation and this was proper under Michelson v. United States, 335 U.S. 469, 479 (1948), where the court discussed the use of and cross examination of character witnesses. It stated:

> The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself

> vulnerable where the law otherwise shields him. . . . his own witness is subject to cross-examination as to the contents and extent of the hearsay on which he bases his conclusions, and he may be required to disclose rumors and reports that are current even if they do not affect his conclusion.

Id.

There was sufficient evidence to convict Londono and Storino although they did not show up until late in the day. They contend that they were mere couriers and not involved in a conspiracy. Chafic testified that Barrett had asked him to drive Barrett's automobile to a particular repair shop in New Jersey, and at this repair shop Londono had inspected the car to determine how many kilos of cocaine could be hidden in it. Londono admitted that he drove down from New Jersey in the car that contained the cocaine that was sold at the airport. However he testified that he was coming to Virginia in the hope of finding work on a farm, but he did not know the name of anyone

who owned a farm or of any openings on a farm. Storino owned the automobile that was used to transport the cocaine and this automobile had been modified to provide an enlarged concealed area for transportation.

VI

Appellants Londono and Storino claim error because of the failure of the trial court to suppress Barrett's post-arrest statement in which he identified photographs of Londono and Storino and stated that they were the drivers of the automobile from New Jersey. When Barrett was on the stand, he admitted that he had told the agents that Londono and Storino had "brought the car that had the drugs in it. I did not tell him that they brought the drugs. I said they brought the car that the drugs were concealed in. That is what I told him." Appellants contend that this testimony

violated the rule established in Bruton v. United States, 391 U.S. 123 (1968) and United States v. Truslow, 530 F.2d 257 (4th Cir. 1975). However, a Bruton problem was not created in the present case because Barrett took the witness stand and was subject to cross examination by the attorneys for Londono and Storino. Truslow, like Bruton, involved a statement by one defendant that implicated other defendants and the declarant did not testify. The crucial difference is that in the present case Barrett did testify and was subject to cross examination. The present facts are similar to those in United States v. Palow, 777 F.2d 52 (1st Cir. 1985) which held that there was no confrontation problem in the admission of a codefendant's post-arrest statement against other defendants where the codefendant testified and was cross examined by counsel for the other defendants.

We find no merit in the remaining exceptions, and we affirm.

AFFIRMED.